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# No. 71-430

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

RALPH D. CRABTREE,

Petitioner,

vs.

BOARD OF EDUCATION,
WELLSTON CITY SCHOOL DISTRICT, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to
The Supreme Court of Ohio

## BRIEF FOR RESPONDENTS IN OPPOSITION

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## BRIEF FOR RESPONDENTS IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents pray that a writ of certiorari to review the judgment of the Supreme Court of Ohio be denied because the petition is not presented pursuant to the rules of this court and the claimed federal question was not adequately raised, considered and ruled upon in the courts below.

## OPINIONS BELOW

The trial court wrote no opinion. Two opinions were written by the Court of Appeals of Jackson County, Ohio, the first being unreported (appendix A of petition), and the second (appendix B this brief) is reported

in 26 Ohio Appellate (2d) 237. The Supreme Court of Ohio wrote no opinion.

## JURISDICTION

Jurisdiction is asserted by petitioner under Rule 19 of this Court and 28 U. S. C. 1257(3) under the provision that review by writ of certiorari is provided,

> "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

but not under the provision of 28 U. S. C. 1257(3),

> "where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States."

## QUESTIONS PRESENTED

I. Has petitioner presented his petition for Writ of Certiorari pursuant to the Rules of this Court?

II. Has the claimed federal question been adequately raised, considered and ruled upon in the State courts and by the Ohio State Supreme Court?

## PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent constitutional and statutory provisions are adequately set forth in the petition.

## STATEMENT OF THE CASE

The only facts in the case are contained in the petition filed in the Court of Common Pleas, Jackson County, Ohio, (App. D of Petition, PP. 26-31) which were admitted to be true for the purpose of deciding the motion, for an order dismissing said petition.

M. D. Slavens, Attorney for Jasper C. Call, has not entered an appearance since the trial court, and consequently is not an Attorney of Record in this petition.

Ralph D. Crabtree, (hereinafter referred to as "Petitioner") was employed by the Board of Education of The Wellston City School District (hereinafter referred to as "Board of Education") under a contract in 1967 which by its terms expired on June 30, 1970. (App. D of Petition P. 28). On September 1, 1968 Petitioner received a Professional High School Certificate (App. D of Petition P. 27) which made him eligible for a continuing contract for the first time for the 1970-1971 school year. (App. E of Petition P. 34, Ohio Revised Code Section 3319.08).

On April 13, 1970 at the regular meeting of the Board of Education the Superintendent of the Wellston City School (hereinafter called "Superintendent") refused to recommend that Petitioner be re-employed and on or about April 14, 1970 the Board of Education gave Petitioner written notice of its intention not to re-employ him after the expiration of his limited contract on June 30, 1970. (App. D of Petition P. 29).

The Clerk of the Board of Education was not present at the April 13, 1970 Board meeting and the Board of Education did not choose one of their members to serve in her place, but had a non-member of the Board of Education take the notes of the meeting (App. D of Petition P. 29).

Thereafter, Petitioner commenced an action in the Jackson County Court of Common Pleas asking that, Respondents be temporarily and permanently enjoined:

> "(1) from reading, approving and attesting the minutes of the April 13, 1970 meeting of the Board of Education;

'(2) That the notice of intention not to re-employ plaintiff by the defendant, Board of Education, dated April 14, 1970, be held void and without effect;

'(3) that the plaintiff be deemed re-employed under a continuing contract at the same salary, plus any increment provided by the salary schedule, no written notice containing reasons directed at the professional improvement of the plaintiff having been given by the Superintendent of the Wellston City Schools of his intention to recommend that plaintiff be re-employed under a limited contract for not to exceed two years prior to April 30, 1970, and no lawful written notice of intention not to re-employ plaintiff having been given by the defendant, Board of Education, prior to April 30, 1970;

'(4) that the defendants, and each of them, be temporarily enjoined to do or refrain from doing or performing any and all acts or omissions necessary and proper to implement these restraints and orders." (Appendix D of Petition Page 30)

The trial court entered judgment for Respondents and dismissed Petitioner's petition on May 18, 1970 (App. A). No evidence was presented in the case.[1]

On May 18, 1970 Petitioner filed his Notice of Appeal and thereafter filed his brief in the Court of Appeals, Jackson County, Ohio, stating three Assignments of Error:

I. The Trial Court erred in finding that the decision made by the Board of Education at the April 13, 1970 meeting not to re-employ Plaintiff was valid when the Clerk of the Board was absent and the

[1] For the Operative facts of the case as found by the Court of Appeals for Jackson County, Ohio in its opinion, See App. B, Page 16.

members of the Board of Education did not choose one of their members to serve as Clerk *Pro Tempore*.

II. The Trial Court erred in finding that the notice of intention not to re-employ the plaintiff, dated April 14, 1970, was valid where the Board's determination not to re-employ the Plaintiff was reached at a meeting where the Clerk of the Board was absent and the members of the Board did not choose one of their members to serve as Clerk *Pro Tempore*.

III. The Trial Court erred in finding that the Board of Education may lawfully terminate the employment of a teacher eligible for a continuing contract on the mere recommendation of its Superintendent without giving such teacher notice of the cause for termination on a hearing, nor an opportunity to cure his deficiencies, if any.

On the Eighth day of January, 1971, the Court of Appeals for Jackson County, Ohio filed its decision affirming the Trial Court, (App. A. of Petition, Pages 16-22), which was not reported, and thereafter filed an amended decision which is reported in *26 Ohio App. (2d) 237*, App. B.[2]

On January 13, 1971, Petitioner filed his notice of appeal, motion to certify and memorandum in support of jurisdiction in the Supreme Court of Ohio, wherein he stated the following propositions of law:

PROPOSITION OF LAW NO. I:

The Requirement of § 3313.23, Revised Code, That When A Clerk of A Board Of Education Is Absent From Any Meeting Of The Board, The Members Shall Choose One Of Their Members To Serve As Clerk *Pro Tempore* Is Mandatory. A Meeting Without Compliance With Such Mandatory Requirement Renders The Meeting Illegal

[2] While this case is reported, and the citation has been assigned, volume 26 Ohio App. (2d) has not at this time been published and is therefore appended to this brief.

PROPOSITION OF LAW NO. II:

The Notice of Intention Not To Re-employ A public School Teacher Is Null, Void And Without Effect Where The Determination Not To Re-employ Such Teacher Was Reached At A Meeting Illegal Because Of Failure To Comply With The Mandatory Requirements of § 3313.23, Revised Code

PROPOSITION OF LAW NO. III:

A Board Of Education Does Not Effectively Terminate The Employment Of A Teacher Eligible For A Continuing Contract Where It Acts Only On The Mere Recommendation Of Its Superintendent Without Giving The Teacher Notice Of The Cause For Termination, A Hearing, Or An Opportunity To Cure His Deficiencies, If Any.

On May 26, 1971, the Supreme Court of Ohio, without requiring oral argument, overruled the Petitioner's motion to certify (App. B of Petition, P. 23) and entered a judgment of dismissal, sua sponte, dismissing Petitioner's appeal as of right (App. C), and issued its mandate to the Court of Common Pleas, Jackson County, Ohio (App. C of Petition, P. 24).

On June 7, 1971 Petitioner filed his motion for rehearing, which motion was overruled on June 30, 1971, also without oral argument.

## ARGUMENT

### I

### THIS PETITION IS NOT PRESENTED PURSUANT TO THE RULES OF THIS COURT.

This petition for writ of certiorari should be dismissed for failure of Petitioner to follow Rule 23 (1) (j) of this Court.

> "If review of the judgment or decree of a state court is sought, there shall be appended to the petition a copy of the judgment or decree in question and any order on rehearing"

Upon the record presented to this Court, by Petitioner (App. A, B, C, D of Petition Pages 16-31) and the jurisdictional statement contained in the Petition (Page 2) the last entry in this case was the order of the Supreme Court of Ohio entered on May 26, 1971 (App. B and C of Petition, Pages 23, 24). Petitioner has not appended the judgment of the Supreme Court dismissing the appeal nor the order denying rehearing.

### II

### THE CLAIMED FEDERAL QUESTION WAS NOT ADEQUATELY RAISED, CONSIDERED AND RULED UPON IN THE STATE COURTS AND BY THE OHIO STATE SUPREME COURT.

Petitioner must, in his statement of the case, specify at what stage in the case, and the manner in which the federal question sought to be reviewed was raised; and the manner in which it was passed upon by the court so as to show that the federal question was timely and properly raised and ruled upon. [*Rule 22(1)(f) of this Court.*] Petitioner has failed to do so. (Page 8 of Petition).

If this court should consider the record to see if the federal question was timely and properly raised, it would find that such is not the case. In the trial court, no constitutional question was raised. Before the Court of Appeals For Jackson County, Ohio (hereinafter referred to as Court of Appeals), the Petitioner attempted to raise a federal question in his Third Assignment of Error, wherein he stated:

> "The Trial Court erred in finding that a Board of Education may lawfully terminate the employment of a teacher eligible for a continuing contract on the mere recommendation of its superintendent without giving such teacher notice of the cause for termination on a hearing, nor an opportunity to cure his deficiencies if any."

Thereafter, in his brief, the Petitioner argued that:

> "Minimal procedural due process under State and Federal Constitutions includes the requirement that a teacher receive a statement of the reasons why the Board of Education does not intend to retain him, notice of a hearing at which he may respond to the stated reasons, and a hearing if he appears at the appointed time and place."

However, this claim had no relation to the facts presented to the trial court.

The majority of the Court of Appeals, in its original opinion, considered Petitioner's contention to the extent of stating that:

> "It is interesting to note that in the third assignment of error that he (Petitioner) advances as an error the *alleged* fact that the teacher was not rehired without giving such teacher notice of the cause for termination on a hearing, nor an opportunity to cure his deficiencies, if any." (App. B of Petition, P. 18) (Emphasis supplied)

The majority of the Court of Appeals, in its revised opinion, also held an injunctive action did not lie as there was a "plain, adequate and complete remedy at law" and held:

> "For these reasons, plaintiff (Petitioner) has not shown that he is entitled to injunctive relief and has exhibited no prejudicial error among those assigned and argued. The judgment of the trial court is affirmed." (App. B, PP. 20, 21).

The Court of Appeals had before it the same facts as have been presented to this Court, those being contained in the petition filed in the trial court (App. D of Petition Pages 26-31). Upon examination of said petition, one finds that no request was made for a hearing or for reasons for non-renewal of Petitioner's contract of employment, or that the Board of Education in fact did not give reasons for non-renewal or a hearing as has been claimed by Petitioner in his petition to this Court (Pages 12, 13 and 15 of Petition). Thus the Court of Appeals made reference to the "alleged fact" that Petitioner was not rehired without giving him notice of cause for termination on a hearing or an opportunity to cure his deficiencies.

While Judge Stephenson in his separate opinion considered the constitutional questions which Petitioner attempted to raise, this must be considered as dictum. He does however, very adequately review the authorities and concludes that absent an allegation of prior exercise of fundamental constitutional rights, due process does not require the giving or reasons for non-renewal on a hearing. (App. B, P. 28)

Judge Stephenson was merely commenting upon a hypothetical question, as the "Assignment Of Error No. Three" was addressed to matters not part of the issues in the case. The decision of the majority of the Court of

Appeals was to the effect that an adequate remedy at law existed. A mere discussion of federal questions in the opinion of a state court is insufficient to give the Supreme Court jurisdiction to review, since the Supreme Court reviews the judgments of State Courts, and not statements in opinions *Black v. Cutter Laboratories (1956) 351 U.S. 292, 100 L ed 1188, 176 S. Ct. 824.*

Upon appeal to the Supreme Court of Ohio, the Petitioner advanced his constitutional claim in his Proposition of Law No. III, wherein he stated:

> "A Board of Education does not effectively terminate the employment of a teacher eligible for a continuing contract where it acts only on the mere recommendation of its superintendent without giving the teacher notice of the cause for termination, a hearing, or an opportunity to cure his deficiencies if any."

Thereafter, in his brief, Petitioner again argued that:

> "Minimal procedural due process under both State and Federal Constitutions includes the requirement that a teacher receive a statement of the reasons why the Board of Education does not intend to retain him, notice of a hearing at which he may respond to the stated reasons and a hearing if he appears at the appointed time and place."

However, as was pointed out in respondents brief before the supreme Court of Ohio, the Petitioner failed to follow *Rule V of the Supreme Court of Ohio* which states:

> "V. The appellants brief *must* comply *with* Rule VI and contain
>
> A. . . . . .
>
> E. An appendix containing (a) a copy of the notice of appeal to the Supreme Court, (b) a copy of the judgment or order appealed from, (c) copies of all judgments, orders, and opinions rendered by any

court or board in the case, (d) complete copies of any unreported case cited, (e) the rules or regulations of any department, board, commission or any other agency relied upon, (such rules shall be set forth in full, or if too voluminous, a copy thereof shall be furnished with each copy of the brief), and *(f) a copy of any statute or constitutional provision relied upon to be construed, or otherwise involved in the case.* (emphasis supplied)

Petitioner did not include any constitutional provisions either State or Federal in his brief.

On May 25, 1971, the Supreme Court of Ohio dismissed the appeal as of right, without opinion, for the reason that "no substantial constitutional question exists herein." (App. C)

This decision could have been based on any of the following grounds:

a. for failure to comply with Rule V of the Supreme Court of Ohio,
b. injunctive relief is improper, there being an adequate remedy at law,
c. the constitutional question was not properly raised in the trial court,
d. procedural due process applies to a deprivation of life, liberty, or property, and the right to specific employment is not property.
e. petitioners constitutional challenge is to § 3319.11, Ohio Revised Code, and not to procedural due process.

If the Supreme Court of Ohio's decision was for any of the above reasons, then Petitioner's jurisdictional claim under *28 U.S. C. 1257(3)*:

"where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under the United States."

is not shown, said federal question not having been timely raised and ruled upon. *Street v. New York 394 U.S. 576, 226 Ed 2nd 572, 89 S. Ct. 1354.*

It should be pointed out, that throughout the appeal of this case in the State Courts, and now before this Court, Respondent has failed to clearly define the issues, and follow the prescribed rules of procedure. This Court has before it all the facts of the case, no evidence having been presented, and a petition which claims jurisdiction under *28 U.S. C. 1257(3)* due to infringement of a privilege guaranteed by the 14th Amendment. But Petitioner goes to great lengths arguing that *Section 3319.11 Ohio Revised Code* is repugnant to the Constitution of The United States. (Petition pp. 14, 15)

As has been pointed out, by the record presented in the petition (App. A, B, C, D of the Petition Pages 16 to 31), and even if this court would consider Respondent's Appx. C, the judgment entry of the Supreme Court of Ohio, which petitioner has failed to include in his petition as required by *Rule 23(1)(J) of this Court*, the action is not filed within the time prescribed by law. In addition, Petitioner has not shown that the federal question presented was timely raised and ruled upon in the State Court *(Rule 22 of this Court). Street v. New York, supra.*

Even if this court should pass over these glaring errors and consider the record of the case, it would find that it is so amorphous and inadequate that it does not permit adjudication. *Ellis v. Dixon 349 U.S. 458, 99 L ed 1231, 75 S. Ct. 850.*

The rule has been laid down that the jurisdiction of the U.S. Supreme Court to re-examine the final judgment of the State Court, can not arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up for

review intended to assert a Federal right. *Oxley Stove Co. v. Butler Co. (1897) 166 U.S. 648.*

## CONCLUSION

For the above reason, the petition for Writ of Certiorari should be denied.

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## APPENDIX A

## IN THE COURT OF COMMON PLEAS, JACKSON COUNTY, OHIO

**No. 19481**

RALPH D. CRABTREE,

Plaintiff,

v.

BOARD OF EDUCATION
WELLSTON CITY SCHOOL DISTRICT, ET AL.,

Defendants.

## JOURNAL ENTRY

**[Filed May 18, 1970]**

This day this cause came on for hearing upon (1) the positively verified petition of the plaintiff and his motion for a temporary injunction and restraining order; (2) the admissions of the truth of the facts stated in the plaintiff's petition by the defendant, Jasper C. Call, member of the Wellston City Board of Education, and his consent to the entry of an injunction as prayed for by the plaintiff; (3) the motion of the defendants, other than Jasper C. Call, for an order dismissing the petition herein; and (4) the arguments of counsel.

The Court, being fully advised in the premises, finds the facts to be as alleged in the petition herein but is of the opinion, and so finds, that under the law and the facts that plaintiff is not entitled to an injunction of any character.

It is therefore Ordered, Adjudged and Decreed that

judgment be, and it hereby is, granted in favor of the defendants, other than Jasper C. Call, and that the petition herein be, and it hereby is, dismissed all at the plaintiff's costs.

Exceptions reserved to the plaintiff and to the defendant, Jasper C. Call.

/s/ T. W. MITCHELL,
*Judge.*

Approved:

LUCAS, PRENDERGAST, ALBRIGHT,
GIBSON, BROWN & NEWMAN
By RANKIN M. GIBSON
*Attorneys for Plaintiff*
Presented under Rule but not approved
JOSEPH A. OTHS
*Attorney for Defendants*
*Other Than Jasper C. Call*
/s/ M. D. SLAVENS
*Attorney for Jasper C. Call*

## APPENDIX B

## COURT OF APPEALS, JACKSON COUNTY, OHIO

**No. 282**

RALPH D. CRABTREE,
Plaintiff-Appellant,

vs.

BOARD OF EDUCATION, WELLSTON CITY SCHOOL DISTRICT, ET AL.,
Defendant-Appellees.

GRAY, P.J.:

### OPINION

This cause is in this court on appeal from a judgment of the Court of Common Pleas of Jackson County denying an injunction to plaintiff.

The plaintiff, *appellant herein*, feeling aggrieved by this action of the trial court filed his notice of appeal and assigned the following errors:

> "1. The trial court erred in finding that the decision made by the board of education at the April 13, 1970 meeting not to re-employ plaintiff was valid when the Clerk of the Board was absent and the members of the Board did not choose one of their members to serve as Clerk pro-tempore.
> 2. The trial court erred in finding that the notice of intention not to re-employ the plaintiff, dated April 14, 1970, was valid where the board's determination not to re-employ the plaintiff was reached at a meeting where the Clerk of the Board was absent and the members of the Board did not choose one of their members to serve as Clerk pro tempore.

3. The trial court erred in finding that a Board of Education may lawfully terminate the employment of a teacher eligible for a continuing contract on the mere recommendation of its Superintendent without giving such teacher notice of the cause for termination on a hearing, nor an opportunity to cure his deficiencies, if any."

The operative facts are as follows. Plaintiff was employed under a limited teacher's contract for a three-year period commencing in 1967 and ending June 30, 1970.

The superintendent of the Wellston city schools, at a meeting of the Board of Education on April 13, 1970 recommended that plaintiff not be re-employed. A notice was given plaintiff on April 14, 1970 reflecting the action of the board.

The regular clerk of the board was not present at the meeting of April 13, 1970 and the board did not choose one of their number to serve in his place as required by R.C. 3313.23.

Mary Riley took notes of the meeting preparatory to the preparation of the minutes.

It is the contention of plaintiff that since the requirements of R.C. 3313.23 were not met, minutes of the meeting could not be prepared, the notice to the plaintiff was a nullity and under other related sections of the law plaintiff is entitled to a continuing contract.

Upon reading R.C. 3313.23, we do not find that the Legislature has fixed any penalty in cases where a board does not appoint one of their number pro tempore.

There is no claim that there were any errors in the minutes. In fact, plaintiff urges that the board has no right to record any minutes under the circumstances. Plaintiff's claim is that only the regular clerk or one elected under R.C. 3313.23 has the authority to record the minutes.

If an injunction were granted under the circumstances, defendant board could never record and approve minutes or come within the ruling or philosophy of the Ohio Supreme Court as enunciated in Village of Vinton v. James 108 Ohio St. 220.

Plaintiff contends for a result that is exceedingly harsh and one which would thwart the announced intention of the school superintendent and school board.

We believe that under the prudent rule announced by the Supreme Court in Village of Vinton v. James, supra, the school board should have a reasonable opportunity to make a record of their meeting of April 13, 1970 so that this court and any other court having jurisdiction of the matter could determine just what action was taken. It might develop that the action of plaintiff was prematurely brought.

The gist of this action as it appears to us is as follows. What action was actually taken? How and by whom was such action taken? What is the truthfulness of the minutes? To put our stamp of approval on the contention of plaintiff would be to exalt form over substance. We as a court are interested in what action was taken and the truthfulness of the minutes and not particularly in the question of who transcribed the minutes.

Carrying plaintiff's contention to its logical conclusion, a board of education could never rectify an error in its minutes by later action if it failed to appoint a clerk from one of its number when the regular clerk was absent.

The gist of petitioner's argument is that he is asking this court to permit him to secure a continuing contract by default. The criterion for the award of a continuing contract to him would be the alleged failure of the regular clerk to be present at a stated meeting of the defendant board and the failure to elect a clerk pro tem

from the membership of the board. Certainly the General Assembly never intended such to be the standard for the employment of a teacher on a continuing contract.

It is interesting to note that in the third assignment of error petitioner argues that the employment was terminated "without giving such teacher notice of the cause for termination on a hearing, nor an opportunity to cure his deficiencies, if any."

We believe that by the same virtue defendant board should be given an opportunity to exhibit to the courts of Ohio the minutes of the meeting pertaining to the teacher contract of plaintiff and that the wise and logical rule announced by the Supreme Court as stated in Village of Vinton v. James, 108 Ohio St. 220 be given effect and that the validity of the contract for employment not turn on the presence or absence of a particular person, such as the regular clerk, at a meeting of the board of education.

It is a generally recognized fact that most members of school boards are laymen and have not been trained in the law.

We believe that plaintiff is attempting to read something into R.C. 3313.23, that isn't there. The Legislature could have said that the failure of a board to appoint one of their number clerk pro tempore at a meeting where the regular clerk was absent, shall make any action taken by the board at such meeting a nullity. The legislature did not say such a thing. Neither do we.

As a general rule resort should be had to remedies provided by statute before other remedies are sought.

Where the statute prescribes a particular mode of review of an adminisative action or decision, a litigant must; if aggrieved by the decision of the administrative agency, seek a judicial review in the manner prescribed

and may not invoke the original jurisdiction of a court by an independent proceeding. Thus an independent proceeding such as an action for injunctive relief is not permissible where an appeal from the action of an administrative agency is provided by statute as it is above. Plaintiff had a plain, adequate and complete remedy at law and has therefore suffered no irreparable injury. Accordingly, his petition has not stated a cause of action.

The law of Ohio as it pertains to this question has been enunciated by the Supreme Court in the following cases.

The syllabus of Perkins v. Village of Quaker City, 165 Ohio St. 120 establishes that an "injunction is an *extraordinary* remedy." (Emphasis added)

At page 125 of the opinion, Judge Zimmerman said: "The authorities are agreed that injunction is an extraordinary remedy equitable in nature, and that its issuance may not be demanded as a matter of strict right."

O'Neill, J. speaking for the court in State, ex rel Pressley v. Ind. Comm. 11 Ohio St. 2d 141, 153 said:

> "The answer is simple. The right of appeal provided by Chapter 2506, Revised Code, is a plain and adequate remedy in the *ordinary course of the law*, while the injunctive relief provided in Section 2727.1 et seq. and the mandamus relief provided in Section 2731.01 et seq. are extraordinary remedies not in the ordinary course of the law."

See opinion of Paul Herbert, J. in State, ex rel Sibarco Corp. v. Berea, 7 Ohio St. 2d 85.

In the present case the point has been made that the majority of the court did not pass upon the third assignment of error. In the first draft of the opinion that was released we stated "Plaintiff has not shown that he is entitled to injunctive relief, hence it will be denied and the judgment of the trial court affirmed." In this draft of the opinion we say: "For these reasons plaintiff has not

shown that he is entitled to injunctive relief and has exhibited no prejudicial error among those assigned and argued. The judgment of the trial court is affirmed." We believe that thereby we have passed upon all of the assignments of error.

Our research has turned up the case of Freeman v. The State of Ohio, 131 Ohio St. 85, which we think is dispositive of this question herein presented. The court at pages 88 and 89 said:

> "Counsel for plaintiff in error devotes three pages of his brief to a claimed error committed by the Court of Appeals in failing to write an opinion stating upon what principles of law the case was decided by the appellate court. While in many cases opinions may be desirable for the benefit of Bench and Bar, there is neither constitutional nor statutory provision requiring the appellate court to write an opinion. Where opinions of the lower courts are available, this court has passed a rule requiring plaintiffs in error to submit the opinions of the lower courts with their briefs; but this does not mean that they are required to write opinions. Counsel for defendant relies entirely upon Section 12248, General Code. That section merely provides that errors assigned and pointed out by brief shall be considered by the appellate court; and that, in case of reversal and remand, the Court of Appeals shall state the error upon which the judgment of reversal was founded. This is done by journal entry. In any event, when the judgment of the trial court is affirmed, as in the present case, the last clause referred to cannot possibly apply."

The Supreme Court cited 12248 G.C., supra. This section is now embodied in R. C. 2505.21.

It has also been suggested that an opinion should not and could not be revised under the facts of this case. Let us see what an opinion is. An opinion does not consti-

tute a judgment or order and forms no part of the record. It is not a paper in a case. The court speaks through its entries and not through its opinions.

This is a case of first impression in Ohio in regard to the applicability of Chapter 2506 to the particular facts of this case. We make a point of it because we believe that the provisions of Chapter 2506 R.C. are dispositive of the question involved herein.

For these reasons plaintiff has not shown that he is entitled to injunctive relief and has exihibted no prejudicial error among those assigned and argued. The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED

Abele, J. concurs; Stephenson, J. concurs in part and dissents in part

LUCAS, PRENDERGAST, ALBRIGHT, GIBSON, BROWN & NEWMAN

RANKIN M. GIBSON — *Counsel for Appellant*

M. D. SLAVENS — *Counsel for Appellee*

JOSEPH OTHS — *Counsel for Appellee*

STEPHENSON, J., Concurring in Part and Dissenting in Part:

I concur in the judgment of affirmance herein and in the majority opinion, in so far as it goes, except I must respectfully dissent to the inclusion therein as a reason for the affirmance of the judgment that the appellant had an adequate remedy at law pursuant to Chapter 2506 Revised Code.

The majority opinion herein is an amended opinion and is not the majority opinion originally filed in this case. The original opinion, filed December 29, 1970, in which I concurred by separate concurring opinion, did not set forth the ground in question. It did not because that issue was not raised in the trial court nor urged or argued in this court nor considered by this court in the rendition of the original opinion.

The record reveals that thereafter on January 8, 1971 in response to the original opinion an entry, in general form and without setting forth reasons, was filed for journalization affirming the judgment of the trial court. On January 14 ,1971, a notice of appeal to the Ohio Supreme Court was filed stating, in essence, that a substantial constitutional question and a question of great general and public interest was presented in the appeal to that court.

Subsequent thereto, the original majority opinion was, sua sponte, amended by inclusion of the reason of the applicability of Chapter 2506 Revised Code. The judgment was not vacated and re-entered. The term of court for Jackson County elapsed prior to filing the amended opinion.

Aside from the question of lack of jurisdiction by expiration of the term, I am of the view that, even assum-

ing authority to do so, an opinion should not be so amended.

The term "opinion" is universally defined as a statement of reasons delivered by a judge or court for the giving of the judgment in that case. See *Vol 29, Words and Phrases, P. 589.* The reasons for the judgment that was entered in this case had no reference to Chapter 2506 and, hence, the latter was not a "reason" for entry of the judgment.

In my view, intolerable confusion will result from amending opinions after judgment on new and distinct grounds not argued or originally considered in the entry of the judgment. If an opinion may, with propriety, be amended as done here at this late date, at what definitive point in the future may it not be amended? The uncertainty such a procedure could generate is obvious and particularly is this so in view of the decision of the Ohio Supreme Court in *Andrews v Board of Liquor Control, 164 O.S. 275,* that when, as here, the judgment entry does not disclose the grounds upon which the judgment is founded, resort may be had to the opinion of the lower court to ascertain those grounds. See also *Pennington v Dudley 10 O.S. 2d 90.* Additionally, the injustice of such a procedure to a losing party is readily apparent inasmuch as the judgment is already entered, an application for reconsideration pursuant to Section 2505.271 Revised Code and Rule VII of the Rules of the Courts of Appeals is precluded. Thus, as an end result of the procedure here adopted, the losing party is denied any opportunity to brief, argue, or otherwise present his views and authorities upon what the majority describes as a "dispositive" issue in the appeal.

I can only conclude that inclusion of the ground in question is improper and it represents, at most, an after-

thought of a ground that could have, but was not, utilized as a reason for the judgment.

I concur in the remainder of the opinion, except I believe we should go further and specifically pass upon the third assignment of error. The appellant has entered as his third assignment of error the following:

> "The Trial Court Erred In Finding That A Board of Education May Lawfully Terminate The Employment of A Teacher Eligible For A Continuing Contract On the Mere Recommendation of Its Superintendent Without Giving Such Teacher Notice Of The Cause For Termination On a Hearing, Nor An Opportunity To Cure His Deficiencies, If Any."

The argument of appellant in support of this assignment of error, insofar as it is claimed the Ohio statutes require a notice with reasons and opportunity to refute the reason as to why a teacher's contract is not being renewed, is without merit. The notice under Section 3319.11 Revised Code to the teacher with reasons directed at professional improvement relates *solely* to the granting of two year limited contracts to a teacher otherwise eligible for a continuing contract.

The remaining argument of appellant urges that the due process clause of the United States Constitution requires "a teacher receives a statement of the reason why the Board of Education does not intend to retain him, notice of a hearing at which he may respond to the stated reasons, and a hearing if he appears at the appointed time and place."

Support for appellant's contentions can be found. *Roth v Board of Regents of State College, 310 F. Supp. 972; Gouge v Joint School District No. 1, 310 F. Supp. 984 and Klein v Joint School District No. 310 F. Supp. 984.* All of these authorities are the decisions of one judge,

namely, James E. Doyle, of the Federal District Court of Wisconsin. From a review of authorities, it would appear Judge Doyle has adopted a minority view.

In *De Canio v School Comm. of Boston, 260 N.E. 2d 676,* the Supreme Judicial Court of Massachusetts summarized the cited authorities in the following manner:

> "In Roth v Board of Regents of State Colleges, 310 F. Supp. 972 (W.D. Wis), and later in Gouge v Joint Sch. Dist. No. 1, 310 F. Supp. 984 (W.D. Wis), a United States District Court judge in Wisconsin held that under his interpretation of the holding of Cafeteria & Restaurant Wkrs. Union, Local 473 v McElroy, 367 U.S. 886, 81 S.Ct. 1743, a public school teacher or college professor, whether or not on tenure, cannot constitutionally be dismissed without notification of the reasons for the impending dismissal and the offer of a hearing. The gravamen of the holding in the Roth case was that "the decision not to retain a professor employed by a state university (or a teacher in a public elementary or secondary school as in the Gouge case) may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason, "310 F. Supp. at p. 979, and that given the requirement of a reason, the professor or teacher must be afforded the opportunity to contest its basis, Id at P. 980."

In rejecting the reasoning of these authorities the court stated:

> "Nor are we persuaded by the reasoning of the court in the Roth and Gouge cases. As the opinion in the Roth case recognized, "it is reasonable that there be available a very wide spectrum of reasons, some subtle and difficult to articulate and to demonstrate, for deciding not to retain a newcomer or one who has not yet won sufficient respect from his colleagues." 310 F. Supp. at pp. 978-979.
> Such reasons are not amenable to proof at a hear-

ing or to review by the judiciary. We therefore choose to follow the greater weight of authority."

In *Griffin v Board of Trustees of St. Mary's College 265 A 2 757*, the Court of Appeals of Maryland in considering a claim of a college teacher that he was entitled to a statement of reasons why his contract was not being renewed stated the following:

> "'. . . Griffin concedes that he does not have tenure and that, absent the "statement of policy", the College had the right to elect not to renew his contract without a hearing and without giving him reasons therefor. His concession is in accord with the weight of authority. See Williams v School District of Springfield R-12, 447 S.W. 2d 256, 270 (Mo. 1969); Bonner v Texas City Indep. School District, 305 F. Supp. 600, 618 (S.D. Tex. 1969); and Parker v Board of Education, 237 F. Supp. 222, 227 (D. Md. 1965) aff'd per curiam, 348 F. 2d 464 (4th Cir. 1965)."

In *Parker v Board of Education of Prince George's County, Md. 237 F. Supp. 222*, wherein the issue was raised as to the right to not renew the contract of a teacher who had not acquired tenure, the court states:

> "Almost every case which has considered the question supports the view that unless there is a statute to the contrary, probationary teacher's contracts may be terminated by the school authorities at the end of any contract year prior to the time tenure is gained, with or without cause and without a hearing."

Numerous cases are cited under footnote 5 in support of the above statement.

Under the Ohio statutory scheme of teacher employment, teachers are hired either under a limited contract for a specific number of years or a continuing contract wherein employment continues until retirement, sus-

pension or removal for cause. Section 3319.08 Revised Code. A board is not required to re-employ a teacher at the termination of a limited contract, subject to statutory notices of non-re-employment.

The difficulty in applying a due process concept to a non-renewal of a limited contract is ascertaining what "right" must be procedurally protected. Absent tenure, a teacher's rights are dependent upon his contract and upon its expiration, he has no vested rights under Ohio law to be re-employed. The relationship between the teacher and the Board is at an end. *Harrison v Board of Education 13 O.O. 182 (App).* Hence, no legitimate purpose is served by a requirement of charges and hearing.

Something might be said on appellant's behalf under due process as to the right of specific charges for non-renewal of contract and the opportunity of refutation where the claim is raised, which it is not in this case, that the decision to rehire was because of prior exercise of fundamental constitutional rights such as first amendment free speech. See *Pickering v Board of Education 391 U.S. 563; Williams v School District of Springfield 447 S.W. 2d 256; Williams v Sumter School Dist. No. 2, 255 F. Supp. 397.*

I am of the view the statutes under which the Board herein acted are constitutional and are not violative of due process. The Supreme Court of Michigan has only recently reached a similar conclusion. *Munro v Elk Rapid Schools 383 Mich. 661, 178 N.W. 2d 450* (July 17, 1970). I would specifically overrule the third assignment of error.

## APPENDIX C

## THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, ) 1971 TERM
)
City of Columbus. ) To wit: May 26, 1971

**No. 71-45**

RALPH D. CRABTREE,
Appellant,

vs.

BOARD OF EDUCATION, WELLSTON CITY SCHOOL DISTRICT, ET AL.,
Appellees.

## APPEAL FROM THE COURT OF APPEALS, JACKSON COUNTY

This cause, here on appeal as of right from the Court of Appeals for Jackson County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Jackson County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of

Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ___ day of _____, 19___.

_____Clerk

_____Deputy